

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3
4 UNITED STATES OF AMERICA

5 Plaintiff

6 vs. Criminal Action No. 05-03E

7 MICHAEL SMITH

8 Defendant

9
10 PROCEEDINGS

11 Transcript of Sentence commencing on Monday,
12 August 8, 2005, United States District Court, Erie,
 Pennsylvania, before Honorable Maurice B. Cohill, Jr.
13 District Judge.

14 APPEARANCES:

15 For the Government: US Attorney's Office
 By: Christian Trabold, Esq.

16 For the Defendant: Federal Public Defender
 By: Thomas Patton, Esq.

17 Reported by:
18 Michael D. Powers, RMR
 Official Court Reporter
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22 Proceedings recorded by mechanical stenography. Transcript
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1 P R O C E E D I N G S

2 (Court convened on Monday, August 8th, 2005, at 10:00 a.m.)

3 THE COURT: Good morning. Be seated, please. I

4 think I got a microphone around here somewhere.

5 You want to turn that on, Nancy? I think it's

6 working. Can you hear me all right?

7 MR. PATTON: Yes, sir.

8 MR. TRABOLD: Yes, Your Honor.

9 THE COURT: This is the time set for sentencing of

10 Michael Smith.

11 And we note that Mr. Smith and Mr. Patton, his

12 attorney, have signed the notice indicating they've reviewed

13 and -- received and reviewed the presentence report. We'll

14 make that report part of the record under seal. If an appeal

15 should be taken, of course counsel will be permitted access

16 to that report.

17 There has been no information given to the Court

18 which was withheld from the defendant.

19 In the wake of the recent decision by United

20 States -- by the United States Supreme Court in United States

21 against Booker, the Sentencing Guidelines are now advisory

22 only, but we are still obligated to consult those guidelines

23 in determining an imposition of a reasonable sentence.

24 In other words, the guidelines, according to the

25 Supreme Court, now must be considered but are not binding on

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1 the Court.

2 There was an objection to the level which the

3 Probation Officer had indicated the offense level should be

4 in the original report, but counsel for Mr. Smith pointed out

5 an error in that calculation and the Probation Officer agreed

6 that there was an error.

7 I think that is the only objection which Mr. Patton

8 had filed. Is that right, Mr. Patton?

9 MR. PATTON: That's correct, Your Honor. And that

10 adjusted the criminal history category.

11 THE COURT: Right. And, thus, after that,

12 Mr. Patton's objection was accepted, so to speak.

13 The offense level here is twenty-nine and the
14 criminal history category is Roman numeral V. And, thus, the
15 applicable guideline range is eighty-four to one hundred and
16 five months of imprisonment, supervised release of two to
17 three years at Count 1, three to five years at Count 2, a
18 fine in the range of \$10,000.00 to \$100,000.00 and a special
19 assessment of \$200.00.

20 At this time, Mr. Patton, is there anything you
21 wish to say or introduce any additional testimony on behalf
22 of your client?

23 MR. PATTON: Your Honor, I would like to point out,
24 I believe you had stated that the total offense level was
25 twenty-nine. I believe that should be a total offense level

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1 of twenty-three with a criminal history category of five.

2 You had the correct guideline range of eighty-four
3 to a hundred and five months.

4 THE COURT: Let me just check the --

5 THE PROBATION OFFICER: Your Honor, may I approach?

6 THE COURT: Sure. I think I have it here. Yes.

7 Well, okay. Now, wait a minute.

8 The original was an offense level of twenty-three

9 and a criminal history category of Roman numeral VI. And

10 then after the objection was filed, the appropriate level

11 should be reduced -- well, the criminal history points should

12 be reduced by one and, thus, the total criminal history

13 points are twelve.

14 This means a criminal history category of Roman

15 numeral V and this reduces the advisory guideline to

16 eighty-four to a hundred and five.

17 You agree with that, Mr. Patton?

18 MR. PATTON: Yes, sir.

19 THE COURT: Okay.

20 MR. PATTON: Your Honor, we don't have --

21 THE COURT: Excuse me one minute.

22 MR. PATTON: Sure.

23 THE COURT: Okay. I got the range right. The

24 offense level is what now?

25 MR. PATTON: Twenty-three.

1 THE COURT: Twenty-three? You agree with that,

2 Mr. Conde?

3 THE PROBATION OFFICER: Yes, Your Honor.

4 THE COURT: All right, Mr. Patton, proceed.

5 MR. PATTON: Your Honor, we have no evidence to
6 present, but I would like to make some comments on Mr. Smith
7 and the information that's in the presentence report.

8 And, you know, this is just an extremely sad case.
9 When you read through the family background of Mr. Smith and
10 see what this young man was put through in his childhood and
11 see that, you know, in a period of seven years -- or he was
12 put in about nine different foster homes; nine different
13 homes in a ten-year period.

14 His mother was a drug abuser and alcoholic. His
15 father was as well; although he's never met his father and no
16 one knows where his father is.

17 Mr. Smith was pulled back and forth between his
18 mother, foster homes and then back to his mother. He was
19 given back to his mother in July of 1982. And then a couple

20 years later, it's found out that his mother is back using
21 drugs along with her boyfriend. The boyfriend is physically
22 abusing Michael, having Michael assist the boyfriend in
23 committing burglaries down in Texas and the mother being
24 subject to physical abuse from the boyfriend, as well as the
25 boyfriend, you know, abusing Michael.

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1 And then finally Mr. Smith -- Michael was adopted
2 by the Smith family and, you know, it's just the impact that
3 that has on children is huge. Children continue to love
4 their parents despite the horrible things that parents
5 sometimes do to their children and always seem to want to go
6 back to their parents. And it's just devastating when a
7 child finally has to come to the realization that their
8 parents just don't love them the way the children love the
9 parents.

10 And I understand that at some point, you know,
11 Michael has to accept responsibility for what he does. He's
12 an adult and I am not here today saying that he's excused in
13 any way from the conduct that he engaged in in robbing the
14 bank, and Michael understands that. He is going to make a

15 statement to Your Honor.

16 And I would just ask Your Honor to consider that,
17 before Michael engaged in this bank robbery, it had seemed
18 that he had kind of gotten his life into a pretty decent
19 place with going to school. He had a fiance. They now have
20 a baby son and he had been working as a home healthcare aide
21 and he had made some strides to try and start leading a
22 normal life and this event occurred and now he is going to be
23 incarcerated for a long time.

24 He remains in contact with his son. His fiance is
25 here. They have had visits at Erie County, although it is

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1 difficult, those visits. They are separated by glass and
2 Mr. Smith's fiance is determined to try and keep their son in
3 contact, to the extent she can, with Michael.

4 Despite whether or not they will ultimately now
5 still end up as a couple, Miss Pena,(Sp), Mr. Smith's fiance,
6 wants her son and Michael's son to know who Michael is, and
7 that is a motivating factor for Michael now, something that
8 he -- you know, now that the son is here, it has -- gives him

9 a goal to work towards.

10 And I would ask that you recommend to the Bureau of
11 Prisons that Michael be housed at the Federal Correctional
12 Institution at McKean because that is the closest facility to
13 where Miss Pena lives and it would allow the visitations to
14 continue and would allow Michael's son the opportunity to see
15 him and visit him.

16 If he is not incarcerated in McKean, it is going to
17 be very difficult financially for Miss Pena to be able to
18 have very regular visits with Michael.

19 So, I would suggest a sentence at the lower end of
20 the guidelines is appropriate. That would take into account
21 his prior criminal history, and a seven-year sentence is
22 longer than any other sentence he has had in State Court so
23 it underscores the penalties to again hopefully impose upon
24 Mr. Smith that he can't continue to engage in this type of
25 conduct.

8

1 And Mr. Smith would like to make a statement to
2 Your Honor.

3 THE COURT: Mr. Smith.

4 MR. SMITH: Good morning. I stand here today
5 before you totally ashamed of my actions. I never set out on
6 December 17th to hurt anyone, but I hurt so many.

7 I would like to say that I am sorry for the crime I
8 committed and you, Your Honor, for having to be here today,
9 to the employees of the bank, which I am so sorry. I can't
10 take back what I had done, but I hope my apology will be
11 enough.

12 And finally to my family. Everything is different
13 now because I am in jail. I am so sorry for letting everyone
14 down. I can never justify my actions for any reason at all.
15 I can only say I felt everything closing in on me, my
16 finances and my fiance and I had just bought a house in
17 October. I had a new car to pay for, insurance, taxes and a
18 new roof and college. I lost one of my jobs and it hit me
19 financially bad. It was also Christmastime. I just felt
20 like my life was falling apart.

21 I was on a new medication. It really wasn't doing
22 anything to help me, and I had a baby on the way. He doesn't
23 deserve to have a father that is in jail. He should have
24 better than that. He is my future now. I will do all that I

25 can to be a good father once I am out.

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1 I still have a future, Your Honor. I can still
2 make a difference. Thank you.

3 THE COURT: Thank you, Mr. Smith.

4 Mr. Trabold.

5 MR. TRABOLD: Your Honor, there is no question that
6 Mr. Smith has had a hard life. I mean, it is obvious from
7 the presentence report, however, the hard truth of the matter
8 is, your life doesn't get any better over time if you
9 continue to victimize innocent people. And you can't give
10 him a lower sentence in this case because he has had a hard
11 life, because the other hard truth is most of the people that
12 come before you have had a very hard life and that's part of
13 the reason that they come before you.

14 But, this case is, in my mind, calls for a sentence
15 at the higher end of the range because Mr. Smith has been
16 provided a whole lot of rehabilitative treatment that a
17 number of other people have not received, and none of the
18 treatment or none of the help has done anything to help him.

19 At some point in your life, you have to make the

20 decision that you are no longer going to victimize people and
21 you are going to try to contribute to society.

22 Mr. Smith, despite a whole lot of resources being
23 spent by their community and other communities to help him,
24 has never made that decision. And it doesn't change the fact
25 that obviously he has had a hard life.

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1 But, again, your life doesn't get any better when
2 you go into a bank and point a BB gun at people's heads and
3 essentially terrorize them.

4 So, for the impact that his conduct has had on the
5 victims in this case, as well as the fact that, prior to
6 today, he has shown very little interest in rehabilitating
7 himself, I ask that you give him a sentence at the higher end
8 of the range.

9 THE COURT: Thank you, Mr. Trabold.

10 Well, I think both counsel on both sides of the
11 aisle here have made good points. Certainly Mr. Smith's life
12 since infancy has been -- represented a failure of the child
13 support system that's afforded by our local and state

14 governments.

15 On the other hand, as Mr. Trabold correctly points
16 out, you can imagine, Mr. Smith, if someone were pointing a
17 gun at your fiance, she wouldn't know whether it was a BB gun
18 or the real thing. A BB gun, in a sense, isn't the real
19 thing, of course, but it's bad from both directions and the
20 Court has to consider those things, the rehabilitation of the
21 person standing before the Court as well as the protection of
22 the community from any future criminal acts performed by that
23 person.

24 I am going to come down in the middle on this thing
25 and I hope that you will be able to take advantage of any

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1 programs that the prisons have.

2 I will recommend that you be placed in McKean
3 although, as Mr. Patton probably has explained to you, the
4 Court can't order the Bureau of Prisons to do anything, we
5 can only recommend, and hopefully they will permit you to be
6 assigned to McKean.

7 We find that the applicable guideline range here is
8 eighty-four to a hundred and five months of imprisonment and

9 the criminal history category is Roman numeral V. And this
10 calls for, as I said before, two to three years of supervised
11 release at Count 1 and three to five years at Count 2, a fine
12 in the range of \$10,000.00 to \$100,000.00 and a special
13 assessment of \$200.00.

14 After consulting with the -- after consulting the
15 guidelines and studying the presentence report and listening
16 to arguments of counsel on both sides this morning, Michael
17 Smith is hereby committed to the custody of the Bureau of
18 Prisons to be imprisoned for a term of ninety-six months
19 imprisonment at Counts 1 and 2.

20 Upon release from imprisonment, the defendant shall
21 be placed on supervised release for a term of five years.

22 This term consists of three years at Count 1 and five years
23 at Count 2, with all such terms to run concurrently.

24 Within seventy-two hours of release from the
25 custody of the Bureau of Prisons, the defendant shall report

1 in person to the Probation Office in the district in which he
2 is released.

3 While on supervised release, the defendant shall
4 not commit another federal, state or local crime, shall
5 comply with the standard conditions of supervision that have
6 been recommended by the Sentencing Commission and adopted by
7 this Court and shall also comply with the following
8 additional conditions:

9 The defendant shall not possess a firearm or
10 destructive device. The defendant shall not illegally
11 possess a controlled substance. The defendant shall
12 participate in a program of testing and, if necessary,
13 treatment for substance abuse as directed by the Probation
14 Officer until such time as the defendant is released from the
15 program by the Probation Officer.

16 Further, the defendant shall be required to
17 contribute to the costs of services for any such treatment in
18 an amount determined by the Probation Officer, but not to
19 exceed the actual cost. The defendant shall submit to at
20 least one drug urinalysis within fifteen days of being
21 released on supervised release and at least two periodic
22 tests thereafter.

23 The defendant shall participate in a mental health
24 treatment program as directed by the Probation Officer until

25 such time as the defendant is released from the program by

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1 the Probation Officer.

2 The defendant shall not purchase, possess or
3 consume alcoholic beverages. The defendant shall cooperate
4 in the collection of DNA as directed by the Probation
5 Officer. The Court finds that the defendant does not have
6 the ability to pay a fine. The Court will waive the fine in
7 this case due to the defendant's inability to pay.

8 It is further ordered that the defendant shall pay
9 to the United States a special assessment in the amount of
10 \$200.00 which shall be paid to the U.S. District Court clerk
11 forthwith.

12 As I indicated before, we find that the sentence
13 within the guideline range, and in this case in the middle of
14 the advisory guideline range, does adequately address the
15 issues of punishment, deterrence and community safety.

16 Mr. Smith, you have a right to appeal within ten
17 days. You are entitled to a lawyer at every stage of the
18 proceedings. If you cannot afford an attorney, one will be

19 provided for you without charge.

20 I don't think there are any counts to be dismissed
21 here.

22 MR. TRABOLD: Correct, Your Honor.

23 MR. PATTON: Your Honor, two things.

24 We will object to the requirement that Mr. Smith
25 provide DNA as a condition of supervised release. I

14

1 understand that you have ruled on those objections in the
2 past.

3 The other issue has to do --

4 THE COURT: Excuse me. The ruling is the same. We
5 will overrule that objection.

6 MR. PATTON: With regard to the special assessment,
7 while generally there is a \$100.00 special assessment for
8 each count of conviction in a bank robbery, in a case where a
9 person is convicted of both unarmed bank robbery and armed
10 bank robbery, those issues merge and it should only be a one
11 \$100.00 special assessment.

12 I have actually done a memorandum of law on this
13 before for Judge McLaughlin, and I apologize, I didn't bring

14 that to you.

15 THE COURT: What did Judge McLaughlin do, agree
16 with you, with your analysis?

17 MR. PATTON: Yes. He did an amended judgment. And
18 I can provide that to the Court and the U.S. Attorney's
19 Office, if you would like, if they would like a chance to
20 review --

21 THE COURT: Does the Government have any comment on
22 it?

23 MR. TRABOLD: I don't have any objection, Your
24 Honor.

25 THE COURT: We'll amend the sentence that I stated

15

1 orally here and make it a \$100.00 special assessment.

2 MR. PATTON: Thank you, Your Honor.

3 THE COURT: Okay. Court is adjourned.

4 (Court recessed on Monday, August 8th, 2005, at 10:25 a.m.)

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8 I certify that the forgoing is a correct transcript

9 from the record of proceedings in the above-entitled matter.

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12 S\
Michael D. Powers
13 Official Reporter

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*****NOT CERTIFIED WITHOUT ORIGINAL SIGNATURE*****

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